Ld

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CHAMBER SUMMONS NO. 1595 OF 2006
IN
EXECUTION APPLN NO.619 OF 2005
IN
SUMMARY SUIT NO.1523 OF 2002

Ashish K.Thakur .... Plaintiff

vs

R.C.H.Barar Trading & Co & anr.Judg.Debtors

Mr.Kirti Munshi a/w Ms.Deepali Thakor i/b Rustamji & Ginwala for Jud.Debtrs

Mr.Sanjay Jain i.b Ranjit & Co for Dec.holder

CORAM : SMT R.S.DALVI, J

DATE : 16th January, 2007

P.C.

1. This Chamber Summons taken out in execution of the exparte decree obtained by the plaintiff is for leave under Order 21 Rule 22 of the C.P.C. and other reliefs relating to the modes of execution of that decree.

2. The plaintiff has applied for and has obtained interim relief of status quo with regard to one of the properties being property no.2 mentioned in the show cause notice to the Chamber Summons.

3. Notice under Order 21 Rule 22 of C.P.C as per

form no.49 of the appendix to High Court Rules has not been seperately taken out. Chamber Summons is served upon the defendants. They have been heard at ad interim stage. Chamber Summons constitutes notice of the reliefs applied for by the plaintiff in this Chamber summons to the defendants. In the ad interim order passed on 19th December 2006 defendants were directed to maintain status quo in respect of preperty no.2 mentioned in the schedule to Chamber Summons. Chamber Summons has been adjourned for consideration on merits.

4. The consideration on merits itself contemplates that notice to the defendants is given which is a show cause notice and defendants would be heard on merits as to why they would want to challenge execution levied by the plaintiff more than two years after the exparte decree is passed.

5. It is however, contended on behalf of the defendants that since notice in proper form is not served, notice under Order 21 Rule 22 of C.P.C. must be taken not to be given. That notice is mandatorily required to be given. That not been given, the Chamber Summons is not maintainable.

6. The defendants have relied upon various judgments of this court as well as other courts to this end.

7. In the case of Laxman Bala Surve vs M/s Posh Builders 1996 (2) MLJ 858, the Division Bench this High court while holding that notice under Order 21 Rule 22 of C.P.C. is mandatorily tobe given, observed the object of that rule. The object of the notice is to furnish an opportunity to the persons concerned to urge any objection that he may have to the maintainability of the execution. After that is done that person would be bound by the order and cannot go behind it. It would therefore operate as constructive resjudicata and it would not be open for him to raise the objection to the ex parte decree at a later stage. It is clarified in that judgement that those objections are with regard to the execution of the decree and not with regard to its validity, since the executing court cannot go behind the decree.

8. What must therefore be borne in mind is the object of the notice. The defendants must be given an opportunity to state how and why the decree which is sought to be executed cannot be executed

in the modes preferred by the plaintiff. That opportunity has been given to the defendants by service of this Chamber summons.

9. In Chamber Summons No. 812 of 2003, in Execution Application No. 128 of 2003, learned single Judge of this court, whilst considering the preliminary objections raised in Chamber summons of this kind considered the cases in which such leave is necessary. That was the case of execution against heirs of the deceased defendants. In para 5 of that order it has been held, after setting out the entire Order 21 Rule 22 of C.P.C,. including sub rule 3 incorporated as Bombay Amendment to C.P.C,. that leave under Rule 22 was a must when legal representatives of the parties are being executed against. That was because they would be put to prejudice if leave was not taken before resorting to Order 21 Rule 37 of C.P.C. for executing the decree by committing them to civil prison. Even in that order object of Order 21 Rule 22 C.P.C. has been laid down which is to avoid prejudice to the legal heirs of the deceased judgment debtor. I am shown that the judgment is upheld in appeal. In para 3 of the judgment in appeal, same object for grant of leave under Order 21 Rule 22 of C.P.C. has been specified. In fact

in the same para the mandatory requirement that is observed is with regard to the provision of Order 21 Rule 50 (2) of C.P.C.

10. In an earlier decision of this Court in the case of M/s Bhurmal Kapurchand & Co vs M/s Premier Machine Tools Co.AIR 1977 BOMBAY 305 the learned single judge held that this notice was mandatory and issuance of a insolvency notice was to circuit the procedure without obtaining leave under Order 21 Rule 22 of C.P.C. which could not be permitted.

11. In the case of Gaurilal vs Smt Sujham Devi AIR 1986 HP 3 requirement of the executing court to issue show cause notice before issuing the warrant for possession has been laid down in cases where the execution is not levied for more than two years since passing of the decree. A reading of the judgment shows that the judgment debtor is required to be served by issue of a notice showing the modes for execution so that he has an opportunity to state why and under which circumstances the mode of execution opted by the decree holder against him cannot and should not be effected.

12. That purpose is amply served by service of this Chamber Summons. The judgment debtor has been

heard on merits at ad interim stage itself. At the very inception, the judgment debtor has mentioned to the Court that property nos. 1 and 3 do not belong to the defendants and property no.2 belongs to the defendants. The plaintiffs shall therefore have to consider the execution of decree against specified properties of the judgment debtor-defendants.

13. Hence, the following order:

. Chamber Summons is made absolute in terms of prayer (a). The Plaintiff as a decree holder shall be entitled to execute the decree in any one of the modes specified in the C.P.C. by taking out an Execution Appliction as per correct procedure. The defendants/judgment debtor shall maintain status quo in respect of the property No.2 in the schedule to the Chamber Summons being property at Berar House, 3rd Abdul Rehman Street, Bombay for four weeks from today.

(Smt R.S.Dalvi,J)